

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|--------------------------------|---|--------------------|
| GORDON BARTEL |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 244,990 |
| ERV'S BODY SHOP |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| UNION INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Claimant appealed the April 11, 2000 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

This is a claim for a back injury that allegedly occurred while claimant worked for respondent from August 1998 through March 2, 1999. The parties agreed that claimant should see a doctor for examination and evaluation, if the Judge would find claimant had provided respondent with timely notice of the accidental injury. Without making any specific findings, the Judge denied claimant's request for benefits. It is reasonable to conclude that the Judge found that claimant had failed to prove timely notice. Therefore, that is the only issue before the Appeals Board on this appeal.

Because claimant did not file a brief or letter with the Appeals Board within the allotted time, the Board is without the benefit of claimant's argument, except what might be found in the transcripts.

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Claimant began working for respondent in August 1996 sanding, taping, and painting vehicles. In the summer of 1998, claimant's back began hurting and he sought

chiropractic treatment in July and August 1998. Despite treatment, claimant's symptoms continued.

2. In January 1999, claimant's back symptoms flared up on a trip from western Kansas to Wichita. Claimant attributed his increased symptoms to a broken seat in his truck and a bad motel bed. That month claimant sought additional chiropractic treatment.

3. Claimant continued to work for respondent through March 2, 1999, when he quit showing up for work because of left leg pain, which had recently begun.

4. Claimant could not identify any specific incident at work that either injured or aggravated his back. But he did testify that sanding and bending over to paint aggravated his back and that his back symptoms progressively worsened the longer he worked.

5. Before working for respondent, claimant had a history of back problems. Claimant initially injured his back in the 1980s and had a lumbar spinal fusion.

6. Claimant does not remember when he first told respondent that his present back problems were related to his work. But respondent's office manager, Linda Smith, testified that claimant did not relate his back problems to work until May 14, 1999. At that time, claimant had been advised that neither Social Security nor Medicaid would pay for medical treatment.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.

2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.¹ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.²

3. The Act requires a worker to provide the employer timely notice of a work-related accident or injury. The notice statute reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10

¹ K.S.A. 1999 Supp. 44-501(a).

² K.S.A. 1999 Supp. 44-508(g).

days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

At this juncture of the claim, it is unclear whether claimant is now alleging that he injured his back in a specific incident or through a series of repetitive mini-traumas. The transcripts do not indicate that claimant contends that just cause existed that would extend the period to provide notice.

4. Based upon the present record, claimant has failed to prove that he provided the respondent with timely notice of the alleged accidental injury. Therefore, the request for benefits should be denied.

5. As provided by the Act, preliminary hearing findings are not binding but subject to modification.⁴

WHEREFORE, the Appeals Board affirms the April 11, 2000 preliminary hearing Order entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

³ K.S.A. 44-520.

⁴ K.S.A. 1999 Supp. 44-534a(a)(2).

c: Joseph Seiwert, Wichita, KS
Mark A. Buck, Topeka, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director